CBS respectfully submits, however, that the Commission's proposed clarification of the right to reject rule would be significantly undermined by the Notice's suggestion that the rule would still permit stations to preempt network programming "to air, for instance, a local sporting event or a local entertainment program."[50] Since by far the largest category of preemptions of prime time CBS Television Network programs is accounted for by affiliates' coverage of sporting events, exempting sports coverage from the proposed clarification of the rule would eviscerate its intended purpose.

As we have indicated, CBS has no desire to restrict the ability of its affiliates to preempt network programming for public interest reasons, including most importantly the presentation of local news and public affairs broadcasts, and other public service programming. The fact is, however, that most affiliate preemptions have nothing to do with local news or community events. During 1994, only 8.1 percent of network prime time preemptions by CBS affiliates were attributable to local news and public affairs programming, with telethons and paid political broadcasts accounting for an additional 7.2 and 2.5 percent, respectively. These preemptions were dwarfed by those for sporting events, which represented 41 percent of the 1994 prime time preemptions, and those for syndicated programming, which were 23 percent of the total.

The primary, if not exclusive, motivation for sports and syndicated programming preemptions is, of course, economic. Such preemptions enable the affiliate to sell all the commercial availabilities in the time period for its own account while receiving the benefit of "audience flows" from the network programming immediately preceding it. Affiliates can

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50 Notice at ¶25.

almost always make more money from a single preemption than from the compensation and inventory associated with a particular network program. But in doing so they limit the audience exposure which the network program can achieve, and thus ultimately reduce network advertising revenues.[51]

The Commission's proposed clarification of the right to reject rule to exclude economically-motivated preemptions is therefore a potentially significant step toward ensuring the continued financial health of broadcast networks. CBS respectfully submits, however, that the impact of such a decision should not be diluted by continuing to allow affiliates free rein to preempt network programming to present highly profitable sports broadcasts. As noted above, during 1994 sports coverage accounted for 41 percent of all prime time preemptions of CBS Television Network programming. The effectiveness of the Commission's proposed clarification of the right to reject rule would therefore be significantly lessened by exempting sports-related preemptions from its scope.

CBS recognizes, of course, that the availability of local sports events to television viewers serves a genuine public interest. It is highly unlikely, however, that such coverage would be lost because of a narrowed interpretation of the right to reject rule. Since at least 70

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[51] See Notice at ¶22. During 1994, almost 5000 station-hours of network programming were preempted by CBS affiliates in prime time alone. The financial impact of such preemptions is significant, since there is almost no way a network can capture the value of its program in the geographic market in which it has been preempted; it is extremely difficult to place a single series, much less a single episode of a series, on an alternate station when the affiliate has rejected it. For example, during September through December 1994 in the Tampa, Florida market, episodes of such highly-rated CBS network programs as MURDER SHE WROTE, MURPHY BROWN, DAVE'S WORLD and NORTHERN EXPOSURE -- as well as other programs -- were preempted and could not be placed on another station in the market.

percent of all households now receive 11 or more over-the-air channels,[52] it is virtually certain that local sports events having significant appeal would remain available to most viewers through carriage on another station in the market.

For example, the public in Raleigh and Charlotte, North Carolina, where CBS affiliates have preempted network programming in favor of Atlantic Coast Conference (ACC) college basketball games, would be very unlikely to be deprived of ACC games even if a particular network affiliate was not able to negotiate the right to preempt network programming in order to carry them. These games are undoubtedly of sufficient appeal that one of the five independent commercial television stations serving the Charlotte DMA, or one of the four commercial independent television stations serving the Raleigh-Durham DMA, would be interested in carrying them.[53]

Of course, under such a scenario, the network affiliates would not derive the significant economic benefits of carrying the popular local basketball games. This, however, should be of no concern to the Commission. If a station has made the economic decision to be a network affiliate and to enjoy the economic benefits of affiliation, it should not be granted a governmentally-guaranteed, unconditional right to act in its own economic interest -- to the detriment of the network system of which it is part -- simply because a sports event in which it seeks to sell commercial availabilities is "local."

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52 Notice of Proposed Rulemaking in MM Docket No. 94-123, FCC 94-266 (released October 25, 1994) at ¶16, citing Nielsen Media Research, Television Audience 1993, at 9.

53 See Broadcasting and Cable Yearbook 1995 at C-148 and C-196. Alternatively, the cable systems serving Charlotte, with a 45 channel capacity, and Raleigh, with a 60 channel capacity, would be likely to offer such games if they have sufficient appeal. See Television & Cable Factbook, Cable Vol. 63 (1995) at D-1208 and D-1234.

It bears reemphasis that the Commission's proposed clarification of the right to reject rule would merely enable networks to bargain for greater assurance against preemptions, but would in no way assure their success in such negotiations. As noted above, the bargaining position of affiliates with respect to their networks has been enormously strengthened by the rise of the Fox Network, the dramatic increase in the availability of original syndicated programming (as well as high quality programming from the new United Paramount and WB Networks), and the improved profitability of independent stations.[54] In an environment already marked by

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[54] In its Notice, the Commission observes that "[t]he key determinant of the relative bargaining position of networks and broadcast television stations ... is the availability of alternative[ ]" partners for each. Notice at ¶14. Noting that there are more than four VHF television stations in only four percent of DMA markets (serving 17 percent of U.S. television households), the Commission states that the networks would appear to have a dominant bargaining position in only these markets if a preference for affiliation with VHF stations is assumed. Id. at ¶12. In this connection, the Commission requests comment on whether such a preference still exists. Id. at ¶13.

Although UHF stations can certainly provide satisfactory outlets to both networks and other program suppliers (see discussion at pp. 30-31, infra), there can be no doubt that networks continue to seek to affiliate with VHF stations whenever possible. Indeed, this fact is irrefutably demonstrated by the fierce competition for VHF affiliates which the four major networks have waged during the past eighteen months. The preference of networks for VHF affiliates is accounted for not only by the lower channel positions and stronger signals of such stations, but also by the strategic importance of an affiliate's early evening newscast for the performance of the network's prime time schedule. It is historically true that VHF stations typically have strong news departments, while UHF stations do not. See A Critique of the Comments of the Station Representatives Association and the MiCRA Analysis with Regard to MM Docket No. 95-90, Wilkofsky Gruen Associates Inc., at 9-10, submitted with Reply Comments of CBS Inc., MM Docket No. 95-90 (September 27, 1995).

In any event, while the bargaining position of the four major networks would be enhanced in many markets if they did not have a strong preference for VHF affiliates -- which in fact they obviously do -- this would not necessarily "constitute[ ] undue market power ... sufficient ... to justify governmental intervention." Notice at ¶13.

(continued...)

pitched battles among networks for affiliations with desirable stations in scores of markets across the country -- and the dramatic increases in affiliate compensation which have attended these battles -- there is no reason to believe that stations wishing to preserve maximum flexibility to preempt network programs will lack the negotiating power to do so.[55] On the other hand, those stations choosing to accept the higher levels of compensation which will presumably accompany more stringent clearance provisions should not be permitted to avoid the bargain they have struck by an expansive interpretation of the right to reject rule.

In sum, a "right to reject" network programs for economic reasons is irrelevant to an affiliated station's ability to serve the public interest, unfairly interferes in the economic relationship between networks and their affiliates, and pointlessly reduces the overall value of networking. For all these reasons, the right to reject should be clarified as suggested by the Commission in its Notice, with the exception that local sports or entertainment programming preemptions should be subject to the same marketplace negotiation as other economically-motivated preemptions.[56]

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[54](...continued)
The presence of the new United Paramount and WB Networks, as well as the availability of original syndicated programming, would still act as a constraint on network bargaining power in negotiations with potential affiliates.

[55] See discussion at pp. 9-10.

[56] CBS likewise believes that the Commission should make clear in this proceeding that there is no longer any regulatory bar to the adoption by networks and their affiliates of so-called "incentive compensation" plans. More than thirty years ago, the Commission struck down several plans of this kind which had been implemented by CBS, and which provided for graduated compensation depending on the amount of network programming cleared by an affiliate. The Commission reasoned that the plans discouraged affiliates from broadcasting the programs of other networks, see Application of Section 3.658(a) of the Commission's Rule, 23 R.R. 769 (1962), and discouraged preemptions for syndicated programming. See Application of Section
(continued...)

B. <u>The Time Option Rule</u>

Section 73.658(d) of the Commission's rules prohibits arrangements between a station and a network whereby the network retains an option on certain hours of the station's time, which it may or may not decide to exercise.[57] As with the right to reject rule, the time option provision was adopted out of the concern that the practice of time optioning would hinder

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[56](...continued)
3.658(a) and (e) of the Commission's Rules, 24 R.R. 520a (1962). The rationale for these decisions would, of course, be largely obviated by the Commission's adoption of the proposals set forth in the Notice. In any event, even if it once were possible to conclude that compensation plans offering financial incentives for clearances were contrary to the public interest, it is no longer. As demonstrated above, in today's video marketplace restrictions on clearance provisions in network-affiliate agreements are not necessary to ensure that new networks and other distributors will be able to find outlets for their programming. There is accordingly no reason why networks should not be free to offer incentives to obtain those last clearances of their programs that are most valuable to them, in order that they may compete effectively with cable networks and others who are not subject to regulatory constraints on their ability to offer economic incentives for carriage of their product.

[57] The time option rule provides that:

> No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with any network organization, which provides for optioning of the station's time to the network organization, or which has the same restraining effect as time optioning. As used in this section, time optioning is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

47 C.F.R. §658(d).

affiliated stations from the development of local programming, and inhibit the emergence of new networks.[58]

In its Notice, the Commission observes that "the extent to which time optioning ever actually achieved its potential negative consequences is questionable."[59] Further, the Commission notes that the time option rule may actually hinder, rather than promote, the development of new networks, since such networks "may not be able to bear the risk of a pre-commitment to use a block of a station's time, but may need the option to use that time to develop a network programming schedule."[60]

While thus questioning the continued utility of the time option rule, the Notice expresses concern about whether its elimination might impose an undue burden on network affiliates. In this connection, the Commission notes that affiliated stations would need sufficient time to decide whether to exercise their right to reject network programming provided during an optioned time period, and to obtain or produce alternative programming in the event the network decided not to exercise its option. Accordingly, the Commission proposes to modify the rule to

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58 Notice at ¶26.

59 Notice at ¶29. As long ago as 1970, the Commission essentially conceded that the rule had not achieved its principal goal, finding that "elimination of option time has not operated to make more time available to nonnetwork programs and to multiply competitive program sources." Report and Order in Docket No. 12782, 23 FCC 2d 382, 396 (1970). The Commission cited this failure of the option time prohibition as a reason for adopting what it thought would be a more direct method of making time available to competitive sources -- the prime time access rule. That rule, of course, has recently been scheduled for elimination in August 1996 on the ground that it is unnecessary in today's video marketplace. Ironically, however, the option time rule remains in effect -- 25 years after the Commission found it to be ineffective in promoting the kind of competition which the Commission now believes will result from the operation of market forces alone.

60 Notice at ¶30.

permit time optioning arrangements, subject to a specified notice period of the network's intent to exercise the option.

CBS welcomes the Commission's tentative conclusion that the present complete prohibition on time optioning should be relaxed. However, because we believe there is no need to retain the rule in any form, we urge the Commission to consider its total repeal.

In our view, it is unnecessary for the Commission to become involved in determining what notice should be required of a network's intent to use an optioned time period. Rather, this should be left to marketplace negotiations between the affected parties. There is little reason to think that networks could -- or would -- seek to impose oppressive contractual provisions on their affiliates with respect to time optioning. Indeed, the 1957 Barrow Report on network practices found that, when time optioning was permissible, the established networks invoked these provisions of their affiliation agreements "[o]nly in the most exceptional circumstances," and "[e]ven in these extremely rare instances, if the station remains adamant the network will not take recourse to any legal steps that might appear to be open to it under the contract."[61] The Barrow Report attributed networks' limited efforts to enforce time options to two factors: the ability of networks generally to get satisfactory clearances because of the popularity of network programming, and the negative consequences for the network inherent in attempting to force clearances in the face of affiliates' resistance.[62]

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61 Network Broadcasting, Report of the Network Study Staff to the Network Study Committee (Oct. 1957) at 296, reprinted in Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1297, 85th Congress, 2d Sess. (1958) ("Barrow Report").

62 Id. at 297.

Today, there is even less reason to fear network overreaching in this regard. As we have demonstrated above, the bargaining power of affiliates vis-a-vis their networks has dramatically increased. Affiliates are thus entirely capable of negotiating contractual provisions which would sufficiently protect their interests with respect to a network's potential use of optioned time periods. Such provisions might, for example, take the form of requiring specified advance notice of the network's intent to exercise its option, or might provide that the affiliate would not be required to carry the network program until its existing programming commitments for the time period in question had expired. In any case, we believe that contractual provisions tailored to the particular needs of the parties involved are likely to be preferable to regulatory solutions designed by the Commission.

Just as an affiliate may bargain with its network regarding the notice to be required of the network's intent to use an optioned time period, the affiliate can refuse to grant an option at all if it believes doing so will interfere with its own more profitable use of the time period in question.[63] If, on the other hand, the network is able to convince its affiliate body that it has a viable programming concept for the time period, its ability to option that period will allow it to make the necessary expenditures to develop the program, knowing that the required clearances

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63 It cannot be seriously contended that networks have the power to force affiliates to option time periods or clear unwanted programs. As noted above, in recent years CBS has had to abandon a number of daytime network-programmed time periods when clearances diminished to the point where the offerings were not attractive to national advertisers. Furthermore, in 1981 -- before many of the marketplace changes that have so greatly increased affiliates' bargaining power -- CBS withdrew a series of proposals to expand its evening news broadcast to one hour in the face of affiliates' "deep and widespread disapproval of the plan, even with economic compensation." Wall Street Journal, April 7, 1982 at A-4. Merely affording networks the right to bargain for option time, therefore, would far from guarantee that they would be successful in securing it.

will be available to allow the program an opportunity for commercial success. Repeal of the time option rule could thus have the effect of promoting the development of new first quality programming for over-the-air television.[64]

In sum, whether or not networks are afforded a contractual option to program additional time periods should be left to negotiations between the parties. Given today's competitive marketplace, there is no reason to assume that networks will have any undue advantage over their affiliates in such negotiations.

C. Exclusive Affiliation Rule

In its Notice, the Commission proposes to eliminate the current prohibition on exclusive affiliation agreements, at least in larger markets.[65] Because CBS believes that the rule

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64 As the Commission notes, the right to option time may be especially important for new networks. The development strategy of these networks has been to begin operation in a limited number of time periods, with the expectation of adding programming into new time periods in the future on an incremental basis. This strategy has been built into new networks' affiliation agreements, in which stations guarantee that they will carry the networks' programming as it is rolled out. See, e.g., WB Communications Station Affiliation Agreement with WPIX Inc., dated as of November 2, 1993, at ¶2(c). These carriage provisions are essential to the new networks' ability to ensure broad enough distribution of its programming when it comes on line to earn advertising revenues sufficient to survive. However, to be prepared for the possibility that their programming may not be ready or be of satisfactory quality as of the originally contemplated start dates, the new networks also need to be able to delay or even cancel their delivery of such programming, and their affiliation agreements expressly reserve this right. Id. at ¶2(a) and (g).

65 Notice at ¶37. The exclusive affiliation rule states that:

> No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any

(continued...)

restricts networks from realizing legitimate benefits associated with such agreements, without being necessary to protect competition or diversity, it urges that the rule be repealed as to markets of all sizes.

As the Commission recognizes, exclusive affiliation agreements can help prevent a station from using a network's programming and promotion to build an audience for the competing programs of another network, the broadcast of which the station may find to be more profitable in a particular instance.[66] Certainly in most business contexts an exclusive franchising arrangement of this kind would be thought to be unexceptional. No one, for example, would expect McDonald's to allow its franchisees also to sell pizza supplied by a third party, since this would allow the franchisee to exploit McDonald's name and products to increase its own profits at McDonald's expense.

The exclusive affiliation rule, however, has been thought necessary to ensure that the development of new networks is not inhibited by the established networks' control over available television outlets. As the discussion in Section I of these comments shows, however, even if the rule might once have been justified by such concerns, it is clearly no longer necessary under today's competitive conditions.

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[65](...continued)
other network organization.

47 C.F.R. §658(a).

[66] Notice at ¶36.

To repeat: since 1970, the number of commercial television stations not affiliated with one of the three original networks has grown from 82 to over 450.[67] As a result of this increase, 69 percent of U.S. television households are now in DMAs with six or more commercial television stations.[68] Moreover, as of 1993, more than 70 percent of all television households received 11 or more over-the-air channels.[69] In this environment, ample opportunities exist for new networks to find outlets for their programming, as the establishment of the Fox Network, and the emergence of the United Paramount and WB Networks, clearly attest.[70]

Nor is it surprising, as the Commission has only recently found, that the new networks prefer to affiliate with independent stations rather than seeking secondary affiliations with existing network affiliates.[71] Indeed, evidence suggests that even in those instances in which new networks have entered secondary affiliations, they move to primary affiliations with formerly independent stations as soon as possible.[72] The reasons new networks prefer primary affiliations

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67 PTAR Report and Order at ¶27.

68 Nielsen Station Index, July 1995.

69 PTAR Notice at ¶16.

70 The Fox Network is now available through over-the-air affiliates in markets serving 97.4 percent of U.S. television households. Nielsen Television Index (Week of October 16, 1995). In their first year of operation, the new United Paramount and WB Networks are available to approximately 87 percent and 83 percent of television households, respectively, either over-the-air or on cable television. Nielsen Television Index (Week of September 18, 1995).

71 Secondary Affiliation Report and Order, 10 FCC Rcd at 4542.

72 While the WB network has entered secondary affiliations in a few isolated markets, these deals have been characterized as "short-term". The article cited in the Notice (¶35, n.33) regarding WB's secondary affiliations reports that of the six markets identified, WB has new stations "pending" in four of them. Joe Flint, Station to Station, Variety, April 17, 1995, at 52. UPN has also been converting secondary (continued...)

are obvious and compelling. Secondary affiliations with established network affiliates result in out-of-pattern clearances that can reduce a new network to the equivalent of a distributor of syndicated programming. With the proliferation of independent stations there is little reason why any network, new or established, would opt for secondary affiliations.

Even in those markets where there are fewer broadcast stations than networks, there is little demonstrated need or demand for secondary affiliations. Cable penetration in markets with fewer than six commercial broadcast stations is on average 66 percent.[73] Where broadcast stations have been unavailable for primary affiliation, new networks can expand their coverage through cable carriage rather than by means of secondary affiliations.[74]

Prohibiting exclusive affiliations does not advance the public interest, even in markets with few broadcast stations. Far more programming is made available to the public by a new network's carriage on a local cable system than by the new network's sharing a broadcast station's limited air time with another network.[75] Moreover, to the extent a small market broadcast

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[72](...continued)
affiliates to primary affiliates. See Television Digest, Aug. 7, 1995, Vol. 35, No. 32 at 9.

[73] Nielsen Station Index, July 1995.

[74] For example, the WB Network has covered 18 percent of the country through cable carriage of WGN, Chicago, in markets without WB affiliates. Broadcasting & Cable, Jan. 2, 1995, at 36. Reportedly, WB "plans to replace WGN with a network of local cable providers or affiliates within the next several years." Id. at 33. Apparently, use of cable carriage to extend coverage is an integral part of WB's plans. Similarly, in 1991, the Fox network had affiliates covering 94 percent of the country, see 1991 Nielsen Television Index, and obtained cable affiliations, rather than secondary affiliations, to cover the gap.

[75] The Commission has noted that:

> [A] proliferation of alternative video delivery systems, such as cable

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station wishes to remain free to accept a secondary affiliation, that matter is best left to negotiation between it and its network. In a market with few broadcast outlets, competition between networks for stations will give each station significant bargaining power vis-a-vis the networks to retain the right to take programming from a second network, if it wishes to do so. The rule prohibiting exclusive affiliations should therefore be eliminated as to small markets as well as larger ones.

D. Dual Network Rule

The Notice also seeks comment on the continued need for the dual network rule, which prohibits a single entity from simultaneously operating more than one network in the same territory.[76] In light of the vast changes in the competitive environment, we submit that the rule is unnecessary for the protection of new networks, places networks at a competitive disadvantage in relation to nonbroadcast multiple channel providers, and will impede advances made possible by digital compression. The dual network rule should be repealed.

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[75](...continued)

> television, makes it possible for entrepreneurs to develop competing 'networks' that deliver programming on a nationwide basis without relying on establishing a group of broadcast affiliates.

Two-Year Affiliation Rule Report and Order, 4 FCC Rcd at 2755.

[76] The dual network rule provides that:

> No license shall be issued to a television broadcast station affiliated with a network organization which maintains more than one network of television broadcast stations: provided, that this section shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network.

47 C.F.R. §658(g).

In 1977, the Commission repealed the dual network rule for radio.[77] Many of the factors underlying the Commission's abolition of the rule for radio apply with equal force to television. The increase in the number of television stations, the growing strength and market share of independent stations, the declining market shares of the traditional networks, the rapid growth of a fourth network, the emergence of two additional networks, and the explosion in the number of cable subscribers and cable programming networks have alleviated the concerns of control and network domination that led to the establishment of the rule.

As the Commission suggested in 1992,[78] there is no reason to believe that the operation of more than one broadcast network by a single entity would operate to reduce program diversity. To the contrary, a network would have every incentive to develop distinctive and diversified programming for its respective network services to appeal to different viewers and extend its overall audience reach. This has been the experience of both radio and cable networks.[79]

If television networks continue to be barred from developing additional broadcast programming services, they will be placed at an increasingly severe disadvantage relative to their competitors in program delivery, including cable programming networks, which are under no such legal constraint and are therefore "able to enjoy economies of scale and marketing

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77 Radio Deregulation, 63 FCC 2d 674, 684-85 (1979).

78 Notice of Proposal Rule Making in MM Docket 91-221, 7 FCC Rcd 4111, 4118 (1992). ("Multiple Ownership Notice").

79 Thus, for example, Turner Broadcasting System, Inc. offers the CNN, Headline News, TNT and Cartoon cable networks, as well as its WTBS superstation. Viacom International provides MTV, VH-1, Nickelodeon, Showtime, and the Movie Channel, co-owns Comedy Central, and has announced plans for subdividing its MTV service into several separate cable channels with distinct formats.

advantages"[80] now denied to broadcasters. As noted above, several cable programming suppliers already provide multiple cable networks. Their number will undoubtedly increase substantially in coming years, particularly with the advent of video compression. To meet this multichannel competition, broadcast networks should be permitted to develop alternative broadcast programming services, rather than be limited to expansion into cable programming.[81]

E. Network Territorial Exclusivity Rule

Unlike the other rules being considered in this proceeding, which are premised on a theory of network dominance, the network territorial exclusivity rule restricts the ability of a network affiliate to exclude other stations from obtaining network programming.[82] In its Notice, the

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80 Notice at ¶39.

81 The dual network rule is especially anachronistic in the context of digital advanced television (ATV) services. The Commission has already decided that the dual network rule will be conditionally suspended for the transition period during which television station licensees (including, of course, network affiliates) are operating both NTSC channels and ATV channels. Memorandum Opinion and Order/Third Report and Order/Third Further Notice of Proposed Rulemaking in MM Docket No. 87-268, 7 FCC Rcd 6924, 6929,6934-37 (1992). The marketplace justification for full repeal of the rule in the NTSC environment applies even more forcefully in the digital environment, where the innate flexibility of digital video compression and transmission will present new technological opportunities for over-the-air broadcast networks and affiliates to compete with their cable and satellite-based pay competition.

82 The network territorial exclusivity rule provides that:

> No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another broadcast station located in the same community from broadcasting the network's programs not taken by the former station, or which prevents or hinders another broadcast station located in a different community from

(continued...)

Commission proposes to repeal the first prong of the rule, which prohibits affiliation agreements which prevent another station in an affiliate's community of license from broadcasting those network programs not cleared by the affiliate.[83] However, the Commission proposes to retain, with possible modifications, the second prong of the rule, which prohibits network affiliation agreements which would prevent the network from affiliating with a station in another community of license.[84] For the reasons set forth below, CBS generally supports these proposals concerning the network territorial exclusivity rule.

The first component of the network territorial exclusivity rule is the converse of the exclusive affiliation rule, and should be repealed for many of the same reasons. As we have indicated, we believe that networks should be free to seek exclusivity from their affiliated stations. Thus, a network has a legitimate interest in avoiding a situation in which its own programming and promotion builds audience flows into the programs of another network. Similarly, an affiliate has good reason to seek exclusivity from its network. It may be inefficient and counterproductive for a station to promote its network brand identity if some of that networks' programming may ultimately

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[82](...continued)

> broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its community upon the programs of the network organization. As employed in this paragraph, the term "community" is defined as the community specified in the instrument of authorization as the location of the station.

47 C.F.R. §73.658(b).

[83] Notice at ¶¶48,50.

[84] Notice at ¶¶49,50.

air on a rival station.[85] Mutual exclusivity may give both network and affiliate the incentive to vigorously promote each other, in order to maximize their joint profits. The two parties to the network-affiliate relationship should be free to bargain with each other for the benefit of exclusivity.

Repeal of the rule would, as a practical matter, have a negligible effect on the viewing public. Although the rule is premised on the belief that the television audience should not be deprived of network programming when other stations in the community would be willing to carry it, the reality is that such alternate clearances are rare.

With respect to prime time, where the clearances rates for network series are virtually 100 percent, and preemptions by affiliates are almost always on a "one-time-only" basis,[86] it is nearly impossible for a network to place a single episode of a program on another station. The situation is not meaningfully different for daytime programming, where it is more frequent -- although by no means common -- for an affiliate to decline to broadcast an entire network program series. In these cases as well, a number of factors make it extremely difficult for a network to arrange for alternative clearances. The affiliates of other networks will, as a practical matter, be generally unavailable for this purpose. And the attractiveness to an independent station of broadcasting an isolated network series will generally be extremely limited: such stations -- which enjoy none of the advantages of regular network affiliation -- can almost always do better financially by selling the more extensive commercial inventory available to them in syndicated or locally-produced programs.

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85 See Notice at ¶47.

86 As indicated in footnote 51, supra, such "one-time-only" preemptions result in the non-clearance of a significant number of hours of network programming.

For these reasons, it is unusual for a network to succeed in placing a non-cleared program on another station in its affiliate's community of license, despite its best efforts to do so. Accordingly, little would be lost by repealing the first prong of the network territorial exclusivity rule, while its repeal would allow affiliates to strengthen their network brand identities to the mutual benefit of both the stations and their networks.

Entirely different considerations are presented by the second prong of the territorial exclusivity rule, which prohibits stations from preventing their networks from affiliating with a station in a different community of license. As the Notice observes

> Exclusivity for an affiliate outside a given geographic area ... appears to us to confer no efficiency benefits but potentially significant costs. We can think of no benefit to the public that would arise from allowing a station to block the broadcast of network programming outside of its market. The detriment to the public can be significant, however, as viewers in a given area could be deprived of network programming, thus inhibiting competition and diversity.[87]

While the Notice suggests that the geographic area in which an affiliate could seek exclusivity might be expanded to the station's Designated Market Area ("DMA") or Grade B contour, CBS does not believe such a modification of the rule would be advisable. Although it is quite unusual for a network to have more than one affiliate within the same DMA, this does occur in certain geographically large markets where a network would be unable to reach a significant number of homes with over-the-air service if it had only a single affiliate. In such situations, the public interest would not be served by allowing a station in the market's dominant city to preclude its network from affiliating with a station

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[87] Notice at ¶49.

licensed to a community at the margins of its own service area, thereby depriving a substantial number of non-cable subscribers of the network's programming.

Nor would expanding the area of permissible exclusivity to a station's Grade B contour be a meaningful change in the rule. Grade B contour overlap between affiliates of the same network frequently occurs, but is of no concern to the stations in question since they are almost always located in different DMAs and therefore do not compete against each other.[88] Since network affiliates are likely to have little interest in obtaining Grade B exclusivity as such, there would be little point in amending the rule to allow it.

In sum, CBS urges the Commission to eliminate the first prong of the network territorial exclusivity rule, while retaining the second prong of the rule as currently written.

III. The Cumulative Effects Of The Proposals Set Forth In The Notice And In These Comments Will Increase Efficiencies In Network-Affiliates Relations Without Impinging On Station Autonomy Or Hindering Development Of New Networks.

Finally, the Commission requests comment on whether the cumulative effect of the proposals advanced in the Notice would have a negative impact on the ability of local stations to control their own program choices, or on the development of new networks. On the contrary, adoption of these measures, including the modifications proposed in these comments, would allow established and new networks to compete more effectively in today's marketplace, without lessening in any way the ability of affiliated stations to serve the public interest.

Initially, we note that the Commission's proposals, as well as those made by CBS in these comments, all assume retention of a clarified right to reject rule. That rule, we submit, is

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[88] See CBS Multiple Ownership Comments at 51-52.

sufficient to preserve the kind of local station autonomy which the Commission has a legitimate interest in preserving. The Commission must ensure that stations retain the right to reject network programming based on public interest considerations. However, the Commission should not be concerned with protecting the ability of stations to extract additional profit from the network-affiliate relationship by preempting network programs which they have contracted to carry.[89]

Viewed from this perspective, elimination of the time option rule would have no effect on local programming autonomy. Stations would retain the right to reject network programming during optioned time periods on the same basis as programming provided for the rest of the network schedule: the station would not have to air programs which it deemed to be contrary to the public interest, and could preempt the network to present programs of greater local or national importance. Thus, while an affiliate might agree to grant its network an option to provide programming during a particular part of the broadcast day, it would continue to have ultimate control over the programming presented during that period. Indeed, an affiliate's grant of an option to its network would give the network no more control over the affiliate's program choices than would a firm agreement between the two parties to expand the network's schedule, which would not (at least after expiration of the prime time access rule) raise any legal question whatsoever.[90] Moreover, as discussed above, affiliates have sufficient

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89 No one, we assume, would argue that there would be any public interest basis for a Commission rule allowing stations freely to preempt syndicated programming in order to carry another program which might achieve higher ratings. The principle is no different with respect to the contractual relationship between a network and its affiliate.

90 As we have previously stated, CBS has no present intention to expand its network schedule in prime time. See CBS PTAR Comments at 15-16 ("[R]epeal of the [Prime Time Access] Rules' basic three-hour restraint ... would not immediately influence CBS's business, because CBS has no present plans to offer more prime time network programming than we do now") (emphasis in original).

bargaining power to ensure that the grant of an option would be structured so as not unduly to impinge on their ability to program the time period prior to the network's exercise of the option.

Similarly, permitting exclusive affiliation agreements would not limit the kind of station autonomy which is properly of interest to the Commission. A government regulation ensuring that an affiliate may take national programming from another network does nothing to protect the station's ability to serve local public interests. And permitting exclusive affiliations would not restrict a station's right to preempt network programming in favor of local news or public affairs broadcasts, or other public service programming. Elimination of the exclusive affiliation rule, particularly if coordinated with repeal of the first prong of the network territorial exclusivity rule, would merely free networks and affiliates to bargain on the terms of exhibition of network programming, free of artificial constraints.

The Commission's proposals would also promote, rather than hinder, the development of new networks. As the Notice observes, the ability to option time periods is of particular importance to emerging networks, since they need the assurance of affiliate clearances in order to build a program schedule, but may be unable to bear the risk of a firm pre-commitment to use the time periods in question.[91] Moreover, since assured distribution of their programming is likely to be of particular importance to emerging networks, they, no less than established networks, would benefit from the Commission's proposal to exclude financially-motivated preemptions from the scope of the right to reject rule. Finally, given the proliferation of independent television stations, and the demonstrated ability of emerging networks to fill any gaps in coverage through cable distribution, repeal of the exclusive affiliation rule should not adversely affect the ability of new networks to find outlets for their programming.

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[91] Notice at ¶30.

For these reasons, the changes in the network-affiliate rules proposed by the Commission in its Notice, and urged in these comments, would not adversely affect the development of new networks. Indeed, as the Network Inquiry Staff expressly found, the existing rules "may actually have the perverse effect of impeding new network entry, without providing any countervailing benefits to competition, diversity or localism."[92]

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92 See Network Inquiry Report at 486. The Notice (¶19) asks whether the length of affiliation agreements has had adverse effects on the entry of new networks, and, if so, whether affiliation agreements should be limited in duration so as to mitigate any entry-inhibiting effects of the changes in the network-affiliate rules proposed herein. Having correctly determined that allowing networks and affiliates freely to negotiate the length of their agreements would allow them to compete more effectively against nonbroadcast providers, the Commission should not move backwards by reimposing limitations on their contractual freedom. Time limits on affiliations are both unnecessary and counter-productive to the development of new networks. Indeed, the most severe effects of a limit on affiliation agreements may be on new networks, as the Commission has acknowledged. Two Year Affiliation Report and Order, 4 FCC Rcd at 2756, 2757. In starting up a new network, it may be critical to have assurance that a station will continue to be an affiliate as a more extensive schedule of network programming is rolled out over a period of years. See, e.g., WB/WPIX Affiliation Agreement, supra, at ¶2(c). Since the repeal of the network-affiliate rules will assist rather than impede new network entry, there are no negative effects that limiting affiliation terms would "mitigate."

CONCLUSION

In order to enhance the efficiency and profitability of the network-affiliate relationship so that broadcasters will not be unfairly hampered in the increasingly competitive video marketplace, the Commission should (1) clarify the scope of the right to reject rule to exclude economically motivated preemptions; (2) abolish the time option rule, leaving issues of notice to negotiation; (3) eliminate the exclusive affiliation rule; (4) repeal the dual network rule; and (5) eliminate the first prong of the network territorial exclusivity rule, while retaining the second prong of the rule as currently written.

Respectfully submitted,
CBS Inc.

By: Howard F. Jaeckel
Howard F. Jaeckel

By: Nicholas E. Poser
Nicholas E. Poser

51 West 52 Street
New York, New York 10019

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Its Attorneys